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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 163

FRANK TERMINI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute and Regulation Involved	2
Statement of the Case	3
The Indictment	3
The Record	4
The Facts	4
Reasons for Granting the Writ	9
Conclusion	14
Appendix A	15
Appendix B	19

CITATIONS:

Cases:

Blau v. United States, 340 U. S. 322	11
Hawkins v. United States, 358 U. S. 74	9, 10, 12
People v. Daghita, 299 N. Y. 194	12
Pereira v. United States, 347 U. S. 1	10
United States v. Walker, 176 F. 2d 564	12
Wolfle v. United States, 291 U. S. 7	11

Other Authorities:

McCormick, *Evidence*, Section 83	11
Wigmore, *Evidence*, Section 2341 (2)	10

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Petitioner Frank Termini prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 2, 1959.

Opinion Below

The opinion of the Court of Appeals in this cause has not yet been reported. This opinion is set forth as Appendix A, hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1959. A copy of this judgment is set forth as Appendix B hereto. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The questions presented in this case relate to the competency of petitioner's former wife as a witness against him at a criminal trial, to testify to matters occurring between them during the period of their marriage, and to the sufficiency of the evidence to support the finding that petitioner made or was a party to the making of false statements to his Selective Service Local Board affecting his draft status.

Statute and Regulation Involved

The statute involved in this case is Title 50, Appendix, United States Code, Section 462 (a), and the regulation involved is Title 32, Code of Federal Regulations, Part 1622.30(a). These read, in pertinent parts, as follows:

> Title 50, Appendix, United States Code,
> Section 462. *Penalties*
>
> (a) * * * (A)ny person who shall knowingly make, or be a party to the making of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *

Selective Service Regulations, Title 32, Code of Federal Regulations, Part 1622.30.

Class III-A: Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship and Privation to Dependents

(a) In Class III-A shall be placed any registrant who prior to August 25, 1953, has submitted evidence to the local board which establishes to the satisfaction of the local board that he has a child or children with whom he maintains a bona fide family relationship in their home. Such a registrant shall remain eligible for Class III-A so long as he maintains a bona fide family relationship with such child or children in their home.

STATEMENT OF THE CASE

The Indictment

The indictment against petitioner alleged three counts of separate false statements by him to his Local Board, bearing upon his "classification * * * for service under the Universal Military Training and Service Act * * * and the Rules and Regulations * * * and directions made pursuant thereto." Count One alleged that petitioner knowingly made a false statement on or about August 19, 1953, in that petitioner "falsely stated in substance and in effect that he maintained a bona fide family relationship with his wife and child in their home * * * which said statement, as the defendant then and there well knew, was false and untrue" (2a-3a).[1]

[1] All numbers in parentheses refer to pages in Appellant's Appendix in the Court of Appeals (which is filed herewith), unless otherwise indicated.

Counts Two and Three each charged respectively that petitioner "was unlawfully and knowingly a party to the making of a false statement bearing upon (his) classification" for military service, in that it was falsely stated "that he had a wife and child with whom he maintained a bona fide family relationship in their home" on the respective dates, e.g., September 16, 1953 and February 16, 1954 (3a-4a).

The Record

The record in this case before the Court of Appeals was a printed appendix containing all of the proceedings in the district court. The exhibits, consisting of petitioner's Local Board file, was handed up to the Court of Appeals for its use in considering this case. A certified copy of the appendix and the opinion and judgment of the Court of Appeals is submitted with this petition.

The Facts

The facts of this case disclose a sordid history of matrimonial strife between petitioner and his former wife, spilling over into his draft status, with the result that following their divorce this former wife charged that on the critical dates in question the petitioner did not in fact maintain "a bona fide family relationship with his wife and child in their home at 1740 Grand Concourse, Bronx, New York" (Count One, August 19, 1953 (3a)) and that he did not have "a wife and child with whom he maintained a bona fide family relationship in their home on the aforesaid date" (Count Two, September 16, 1953; Count Three, February 16, 1954 (3a-4a)).

There is no dispute as to the fact that on these three critical dates petitioner and this former wife, the principal

witness against him in this case, were still married and that they had a child. Petitioner supported this wife and child, either under court order or by virtue of their reconciliation, after several separations and reconciliations. Nor did the testimony of this "wife" relate to any acts of petitioner where she was the victim of any criminal conduct. The testimony of the "wife" was to the effect that appellant did not, on the dates in question, maintain a bona fide family relationship with her and their child (72a), thereby branding as false the statement submitted by him, or to which he was a party to the making, to the Local Board.

This former wife, whose name appears in the record as Roslyn Belkin, her new married name, testified that Government's Exhibit 1-D, a letter to the Local Board, dated February 16, 1954, signed "Roslyn Termini" was not written or signed by her (74a-75a), and it was this act of denial which supplied the sole evidence of falsity with respect to petitioner's conduct charged in Count 3 of the indictment. Similarly, she denied that she and petitioner lived together in a bona fide family relationship with their child on August 19, 1953 and September 16, 1953, thus giving the only substantial proof of falsity to petitioner's conduct alleged in Counts 1 and 2 of the indictment. There was no other proof that these statements by or on behalf of petitioner to the Local Board were in fact false. This former wife stated on cross-examination that at least as to one letter, concededly written by her to the Local Board, dated April 16, 1952 (part of Government's Exhibit 1 and marked also as Defendant's Exhibit F), that she was "intimidated into writing that letter" (102a). This latter remark was stricken by the Court as not responsive to the question put to her; but this remark is typical of the type of testimony she gave against petitioner and is

substantial evidence of the great hostility and animosity she bears against him.

The wife's father and mother, Charles and Florence Cohen, attempted to testify that petitioner "never" lived at their residence with their daughter and the child, but their total testimony was vague and indefinite (131a-146a), and this testimony was obviously designed and colored to help their daughter against her former husband. The entire record of the trial bears witness to the marital strife of this couple and of the former wife's clear desire for revenge against petitioner. Even the members of the Local Board were aware of the marital discord of this couple, for they recorded it in the Selective Service file. One such summary of a hearing before this board contains this entry:

> "Parties appear to be still in conflict and had an argument while appearing before the Board. It seems they will separate soon again" (Defendant's Exhibit C; part of Government's Exhibit 1 (65a)).

Finally in March, 1954 the parties entered into a separation agreement (110a), culminating in a divorce in May, 1954. This last change in the marital relationship of the parties was conveyed to the Local Board by appellant on May 11, 1954 (Government's Exhibit 1-G (47a)).

Petitioner appeared as a witness in his own behalf and testified to his marital strife. He also testified that he did in fact maintain a bona fide home with his wife and child on the three dates in question (218a-230a).

As to the three dates in question in the indictment, the evidence is far from convincing that petitioner was not in fact maintaining a bona fide domicile with his former wife and child. As to August 19, 1953 (Count One), it was petitioner himself who wrote to the Local Board

stating that his "draft status has been changed due to the fact that I am living with my wife and child" (Government's Exhibit 1-A (16a, 17a-18a)). Thereafter on September 16, 1953, a letter signed "Roslyn Termini" was received by the Local Board (Government's Exhibit 1-B (19a-20a)). This letter states that appellant's "classification should be changed because he is providing a bona-fide home" (20a). It is these two documents which form the foundation of the charges in Counts One and Two of this indictment.

On September 16, 1953, the date of the second letter, the Local Board had a hearing, and as a result of that hearing they wrote a summary (Government's Exhibit 1-C (26a)), indicating that the wife is ill but is to appear on September 30, 1953. The letter of September 16, 1953, signed by the wife was presented to the board, together with a note from the wife's doctor disclosing her illness from an ear infection and inability to appear for that reason. The board called for an appearance by the wife on September 30, 1953 (39a-40a).

In the meantime on September 11, 1953, the Local Board wrote to the Veteran Assistance Welfare Center of the New York City Department of Welfare for an investigation of petitioner's status. This resulted in an interview with the wife on October 23, 1953 and a report filed with the board on November 9, 1953. This report dated November 9, 1953 is reprinted at pages 59a-61a of Appellant's Appendix.

At the hearing before the Local Board held on September 30, 1953, the board prepared a summary of the hearing (42a-43a, Government's Exhibit 1-F). From the summary it appears that the wife called the board and "advised she will not appear there" (42a). No further statement was made by the wife to the board to the effect that she and her then husband were separated or that he (petitioner)

was not then maintaining a bona fide domicile and home with her and the infant child.

The board received the welfare investigation report on November 13, 1953, long after the dates alleged in Counts One and Two (59a). This report reads in pertinent part as follows:

> "Our worker visited the home on October 23rd, 1953, at which time the registrant's wife was seen. She refused to answer any questions, stating that she and her family had all been down to the Board and had then told them that she would answer no further questions.
>
> "We explained that it was to the registrant's advantage to cooperate with the Board regarding information concerning their present situation, but Mrs. Termini said she did not care what happened.
>
> "It was noted, at the time of the visit, that the registrant, his wife and child were living in the six room heated apartment of the registrant's wife's parents, Mr. and Mrs. Cohen, in whose name the apartment was leased.
>
> "We discussed the fact that we were unable to secure any information with our Administrator, who suggested that we contact the registrant, through his employment record, which we obtained from the Local Board" (59a-60a).

This report also disclosed that the investigator communicated with the wife's doctor who verified her illness with an ear infection at about the time of the letters to the board explaining her inability to appear before them (62a).

The investigator, Ruth Piper, was called as a witness by petitioner, and she described her visit to the wife during November, 1953 (194a-206a). Mrs. Piper, of course, was

an impartial witness, and it was clear from her testimony that the information contained in her report as to petitioner residing with his wife and child at his "in-laws" apartment at 1209 Grand Concourse, Bronx, New York, was learned from the wife (204a-205a).

Objection to the competency of this former wife testifying was made to the trial judge, sitting without a jury, but all objections in this regard were overruled.

Reasons for Granting the Writ

The decision of the Court of Appeals below does not appear to be in harmony with recent decisions of this Court defining the scope and limits of the testimonial privilege arising from the marital relationship between husband and wife. The narrow construction given by the Court of Appeals to this privilege in post-marital testimony by one of the spouses, appears to be unwarranted both in principle and upon the facts of this case. While there is no direct conflict between this case and the recent case of *Hawkins* v. *United States*, 358 U. S. 74, nevertheless the principle in that case prohibiting one spouse from testifying against another in a federal criminal case would seem to govern the situation in this case, thus requiring a re-examination of the narrow ground upon which the Court of Appeals based its holding in this case. Accordingly, and in view of the importance of the evidentiary problem engendered hereby, this is an appropriate case for review by certiorari.

1. The former wife of petitioner was not a competent witness to testify against him concerning matters occurring between them during the period of their marriage. Petitioner's trial attorney made timely and proper objections to the competency of this former wife as a witness

against him, since she was called to testify to matters implicit in their marital relationship during their marriage. On the authority of *Pereira* v. *United States*, 347 U. S. 1, the trial judge overruled these objections. The Court of Appeals, in affirming the judgment of conviction, relied squarely on the *Pereira* case, holding that while the marital privilege "is generally acknowledged to survive the termination of the marriage, it is authoritatively limited to utterances to one's spouse intended to be kept confidential." Clearly it does not here extend to the testimony of defendant's ex-wife, which largely dealt with her residence of her parents, the membership of their household and kindred matters."

It is respectfully submitted that under the facts of this case, the reliance of the Court of Appeals on the *Pereira* case is misplaced, and the principles of the *Hawkins* case, *supra*, should be followed in this situation. In the *Pereira* case the defendant's former wife was the victim of his swindle. This Court held that there was no marital privilege of confidential communications between the defendant and his former wife, since the parties did not intend that there be any confidential character to these communications. The proof clearly showed that there were always third parties present at the time of the making of the challenged communications, and that these communications were made for the purpose of accomplishing the swindle against the former wife. In his opinion in the *Pereira* case, Mr. Chief Justice Warren stated that divorce "does not terminate the privilege of confidential marital communications," citing Wigmore, *Evidence*, Sec. 2341 (2). This Court also stated:

> "Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to

be private. *Blau* v. *United States*, 340 U. S. 322; *Wolfle* v. *United States*, 291 U. S. 7." (347 U. S. 1, 6.)

The gravamen of the charge against petitioner here is that the statements made by him, or on his behalf, to his Local Board in support of applications for deferment, were false. The sole proof of falsity was the testimony of this former wife, that they did not live together on the dates in question. There is no proof in this regard that the parties intended that the acts between them, and the communications upon which such acts were based, were not to be confidential. Thus this former wife cannot be permitted to testify against her former husband, and in this way repudiate her acts, or the marital arrangements between her and her husband leading to such acts, thereby destroying the privilege inherent in the communications between them. Since the communications between them were privileged, the acts founded upon such communications are likewise privileged, and divorce does not remove the testimonial privilege. See McCormick, *Evidence* (1954), §83, pp. 170-171.

The narrow holding of Chief Judge Clark in his opinion in the Court of Appeals in this case, is that the marital privilege "is authoritatively limited to utterances to one's spouse intended to be kept confidential." Judge Clark would thus remove from the ambit of the privilege all knowledge gained by a spouse affecting the other spouse, from any sensory or intellectual perception. The term "communication" within the marital privilege thereby becomes limited to verbal utterances; this is much too narrow a definition of this term for appropriate use in federal criminal trials. A better view and definition of the term "communication" is that expressed by Chief Judge Albert Conway, of the New York Court of Appeals, in the case

of *People* v. *Daghita*, 299 N. Y. 194, 198, 199, where the Court stated as follows:

> "The applicable general rule which we have applied in this State and which has the support of the weight of authority throughout the United States, is that the term communication means more than mere oral communications or conversations between husband and wife. It includes knowledge derived from the observance of disclosive acts done in the presence or view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing. An act may communicate knowledge to the known observer and repose a confidence in him clearly and unmistakably as if accompanying descriptive words were uttered."

It is respectfully submitted that since the wife was not a competent witness against her husband at all during the time that they were married, that she should not become a competent witness against him after divorce as to matters inherent in their marital relationship. That she should be prevented and forestalled from repudiating the facts of her marriage, as well as the marital conduct of the parties together. See *Hawkins* v. *United States*, *supra*; *United States* v. *Walker*, 176 F. (2d) 564. In view of the widespread incidence of divorce in the United States, this Court should notice judicially this sociological effect, and consider it in weighing the problem of the post-marital testimonial privilege between spouses in federal criminal cases. One spouse should not be left free to testify against the other merely because she so desires, and because she bears a personal grievance against her former spouse for matters unrelated to the criminal litigation. It is to be noted that the former wife in this case was

not in any respect a victim or the object of the criminal conduct alleged against petitioner.

2. The guilt of petitioner was not established by clear and convincing evidence that he made or was the party to the making of false statements as to his marital status to his Local Board. The sole substantial evidence of guilt—the sole evidence of falsity in the statements to the Local Board was the testimony of the former wife denying that the parties lived together in a *bona fide* marital status on the dates in question. This evidence, as presented, was of a very vindictive nature. And the impartial witness, the Welfare Department investigator, Mrs. Ruth Piper (194a-206a), showed clearly that the parties were in fact living together as late as October 23, 1953. The trial judge rejected this testimony, but it was the government which introduced into evidence the written report of the Welfare Department to the Local Board containing the substance of this testimony, and thus it was the government itself which offered the contradictory and refutory evidence to the former wife's testimony.

The sole basis in the record that the petitioner lied to his Local Board was his former wife's testimony. Convictions of crime should not be permitted to be based on such evidence. The wife's testimony covered two aspects—she denied the parties lived together on the crucial dates, and she denied writing the letters signed with her name. Counts Two and Three are based upon the latter fact, the signing and sending of the two latter letters. As to Count Two, the report of the investigator of the Welfare Department negatived the proof of that count, and inferentially negatived the proof as to Count One. As to Count Three there is no direct refutation by petitioner, except his denial of the allegation while a witness in his own behalf. This denial must be taken in terms of the

totality of the evidence of record in this trial. On this flimsy record of this alleged criminal conduct this conviction should not be permitted to stand.

It is respectfully submitted that for the foregoing reasons this case warrants review by certiorari.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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June 30, 1959

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 287—October Term, 1958.

(Argued May 4, 1959 Decided June 2, 1959.)

Docket No. 25314

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK TERMINI,

Appellant.

Before:

CLARK, *Chief Judge,*

WATERMAN, *Circuit Judge,* and GALSTON, *District Judge.*

Appeal from the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge.*

Frank Termini appeals from a judgment of conviction on three counts of violations of the Selective Service Act, 50 U. S. C. Appendix §462(a). Affirmed.

DANIEL H. GREENBERG, New York City (William W. Kleinman, Brooklyn, N. Y., on the brief), *for appellant.*

WILLIAM H. SPERLING, Sp. Asst. U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Cornelius W. Wickersham, Jr., U. S. Atty., Brooklyn, N. Y., on the brief), *for appellee.*

CLARK, *Chief Judge*:

Frank Termini appeals from his conviction for violation of 50 U. S. C. Appendix §462(a) for making false statements to his Selective Service Board on August 19, 1953, September 16, 1953, and February 16, 1954, that he was then living with his wife and child. Trial was had before Judge Bruchhausen, a jury having been waived. The sole issue seriously contested at the trial was the truth or falsity of his statements to the Draft Board. The testimony of Termini's former wife, who had divorced him some time prior to the trial, and that of her parents, with whom she and their child resided during the period in question, provide ample support for the trial judge's finding that Termini was not living with them as he had said he was. The credibility of these witnesses, of course, is not a matter upon which we may substitute our judgment for that of the court below. Hence the substantial question before us is his contention that the testimony of his former wife was improperly admitted.

Two distinct evidentiary privileges have been recognized as arising from the marital relationship—a right to bar all testimony of one spouse adverse to the other, and a more limited privilege applicable only to confidential marital communications. *Pereira* v. *United States*, 347 U. S. 1, 6; *United States* v. *Walker*, 2 Cir., 176 F. 2d 564, 567, certiorari denied 338 U. S. 891; *United States* v. *Mitchell*, 2 Cir., 137 F. 2d 1006, 1007-1008, adhered to 2 Cir., 138 F. 2d 831, certiorari denied *Mitchell* v. *United States*, 321 U. S. 794. As the present-day justification of the former is said to be its minimizing of marital discord, *Hawkins* v. *United States*, 358 U. S. 74; *United States* v. *Walker*, *supra*, 2 Cir., 176 F. 2d 564, 568, it is well settled that the privilege ends with the dissolution of the marriage as by divorce. *Pereira* v. *United States*, *supra*, 347 U. S.

1, 6. And while the latter privilege is generally acknowledged to survive the termination of the marriage, it is authoritatively limited to utterances to one's spouse intended to be kept confidential. Clearly it does not here extend to the testimony of defendant's ex-wife, which largely dealt with her residence with her parents, the membership of their household, and kindred matters. *Pereira* v. *United States*, *supra*, 347 U. S. 1, 6; *United States* v. *Mitchell*, *supra*, 2 Cir., 137 F. 2d 1006, 1009. Moreover, we find no merit in defendant's vigorously urged contention that the recent decision of *Hawkins* v. *United States*, *supra*, 358 U. S. 74, supports his position. In that case the Supreme Court did no more than reaffirm the broader of the two marital privileges, despite that privilege's doubtful efficacy. See *Yoder* v. *United States*, 10 Cir., 80 F. 2d 665; *United States* v. *Walker*, *supra*, 2 Cir., 176 F. 2d 564, 569 (dissent of Clark, *J.*); *United States* v. *Graham*, D. C. E. D. Mich., 87 F. Supp. 237; McCormick on Evidence 145 (1954). We find no suggestion in the Court's opinion of an intent to disturb the well settled limitations of the privilege as to confidential communications which it had reaffirmed only shortly before in *Pereira* v. *United States*, *supra*, 347 U. S. 1.

Similarly, there is no merit in defendant's final contention that his statements were not material to his draft classification, since he was entitled in any event to a deferment on grounds of resulting hardship to his child under Selective Service Regulations, 32 CFR §1622.30(b). Sec. 462(a), 50 U. S. C. Appendix, by its terms requires only that the false statement be one "regarding or bearing upon a classification or in support of any request for a particular classification," while under the perjury statute, 18 U. S. C. §1621, and the statute dealing with false statements to the Government, 18 U. S. C. §1001, it suffices to show that the falsehood "is capable of influencing the

tribunal," *United States* v. *Henderson*, 7 Cir., 185 F. 2d 189, 191, or that it "could affect or influence the exercise of a governmental function," *Freidus* v. *United States*, D. C. Cir., 223 F. 2d 598, 601. Moreover, in *United States* v. *Rubinstein*, 2 Cir., 166 F. 2d 249, 254-255, this court came close to holding that a registrant's right to draft deferment on one ground is wholly irrelevant to the criminality of false statements supporting an application for deferment on another. But defendant's contention here may be more narrowly answered. For he has not shown that he would have received a deferment on grounds of hardship to his dependent child had he not been deferred as living with his wife and child.

Conviction affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June, one thousand nine hundred and fifty-nine.

PRESENT:

HON. CHARLES E. CLARK,
Chief Judge.

HON. STERRY R. WATERMAN,
Circuit Judge.

HON. CLARENCE G. GALSTON,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRANK TERMINI,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk